LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]

REQUESTING ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

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I. INTRODUCTION

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) & 5 U.S.C. § 504 et seq., authorizes payment by the government of attorney's fees and costs for successful litigation against the government in the federal courts. A successful litigant who establishes eligibility under EAJA is entitled to a fee award for both litigating the case and litigating the fee request. Fees and costs under EAJA can be awarded without regard to what the client paid or did not pay, including in cases taken on a pro bono basis.

This advisory addresses the deadline for filing an EAJA fee application and discusses the statutory requirements for eligibility. In addition, the advisory addresses procedural aspects of filing an EAJA fee application, including documenting and calculating fees. Highlights of this advisory include:

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Preparing for Filing an EAJA Fee Application Even Before Commencing Litigation

- Have a clear, written agreement with your client (and co-counsel, if any) at the outset of the representation regarding who is entitled to the fees in the event of a court award or settlement. Fees belong to the client absent a representation agreement to the contrary.

- Keep contemporaneous time records with descriptive billing entries on all time spent by attorneys, paralegals and law clerks preparing for and litigating the case and an itemization and description of all costs incurred.

- Pursuant to the Supreme Court's decision in *Buckhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources*, a judicially enforceable court order or settlement agreement memorializing a federal court victory is necessary to establish prevailing party status.

- Although EAJA does not require it, it may be advisable to state in the original pleadings or brief that attorneys' fees will be requested under EAJA.

Assessing EAJA Fee Eligibility and Filing an EAJA Fee Application after Winning in Federal Court

- The fee application must be filed within 30 days of entry of final judgment in the action; i.e. within 30 days after the expiration of time for filing an appeal, or, if an appeal is filed, within 30 days of entry of final judgment by the court of appeals or Supreme Court.

- The fee application must establish that the petitioning party is a prevailing party who has met the appropriate "net worth" requirements. The application also must allege that the pre-litigation and litigation position of government was not substantially justified and that there are no special circumstances that would make an award unjust.

- The fee application must include a statement of the total amount of fees and costs requested along with an itemized account of time expended and rates charged.

- If the fee application is for work performed in more than one court (i.e., district court and court of appeals), check the relevant case law and local court rules to see where the application should be filed.

II. PROCEDURAL REQUIREMENTS

A. Overview of the Components of an EAJA Fee Application

An application for fees and costs under EAJA should include the following:

- A written motion explaining why your client is statutorily eligible (See Part V)
- A signed affidavit executed by each named party attesting that he/she met the appropriate net worth requirements at the time the action was filed (See Part VD)

- Contemporaneous time records and description of costs (See Part IIB)

- Evidence of award calculation/formula used to calculate the requested fee award (See Part VI)

In addition, an application may include:

- An application form, if required by local rule

- Evidence of prevailing market rates for paralegal or law clerks in your area (surveys, declarations from other attorneys)

- Evidence of prevailing market rates for attorneys claiming enhanced rates based on specialize knowledge (See Part VIC)

Before filing an EAJA fee request (if not done earlier) attorneys need a clear, written agreement with their client (and co-counsel) regarding who is entitled to the fees in the event of a court award or settlement. Fees belong to the client absent a representation agreement to the contrary.

B. Documenting Fees and Costs

1. Compensable work

In general, fee-shifting statutes like EAJA compensate for time that is "reasonably expended *on the litigation*." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added). In preparing the fee request, the petitioning party is expected to exercise "billing judgment," *i.e.* "make a good-faith effort to exclude from a fee request house that are excessive, redundant, or otherwise unnecessary…." *Hensley*, 461 U.S. at 434.

The initial work performed before the immigration service or the immigration courts is not compensable.[3] However, requesting compensation for time preparing litigation is permissible. The Supreme Court has expressly approved compensation for time spent drafting the initial pleadings and developing the theory of the case. *Webb v. Board of Education*, 471 U.S. 234, 243 (1985) (citation omitted).[4]

A petitioning party who has established eligibility for fee award is entitled to recover "fees on fees." In other words, the party is entitled to compensation for time reasonably expended on litigating the fee request. *Commissioner, INS v. Jean*, 496 U.S. 154, 163-165 (1990).

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[3] *See, Ardestani v. INS*, 502 U.S. 129, 135 (1991). *See also*, n. 9, *infra*.

[4] *But see, LaPointe v. Windsor Locks Bd. of Educ.*, 162 F. Supp. 2d 10, 18 (D.Conn. 2001) (reducing fee award for pre-litigation time spent in telephone conferences with client and co-counsel, drafting memos to file, drafting correspondence to her client because, that court concluded, "none of these activities were actually spent 'on the litigation'").

2. Keeping Contemporaneous and Detailed Time Records

The EAJA fee applicant bears burden of documenting fees and costs. *Hensley v. Eckerhart*, 461 U.S. 424, 438 (1983). A fee award may be reduced for insufficient or inadequate documentation. For this reason, it is best to keep contemporaneous time records indicating: (1) the date; (2) the identity of the timekeeper; (3) a description of the specific task performed; and (4) the amount of the time spent on the task.

Include some detail when describing the specific task performed. For example, instead of "research and drafting legal brief or motion" one might write "research for opening brief" or "drafting habeas petition."[5]

Maintain a list containing the date and description of all costs stemming from the litigation, including, for example, filing fees, long-distance telephone and facsimile charges, messenger/courier fees, computer research and expert witness fees.

Itemize the fees and costs incurred. This will assist the court in determining whether the hours and costs claimed are reasonable for the work performed. Thus, an EAJA fee application should include a tally of the total number of hours expended on the litigation by each timekeeper, the total amount of costs, and the total amount of combined fees and costs requested.

3. Defending Against Allegations of Improper Time Records

Once an EAJA fee application is filed, the government's response often raises objections to billing entries that it deems to be vague, imprecise or duplicative. The government will usually request that the court remedy the alleged impropriety by reducing any fee award in the exercise of discretion.

Case law addresses the degree of specificity required for billing records and whether the records, taken in context, are sufficient to identify the substance of the work done. In addition, presenting documentary or testimonial evidence from qualified attorneys who have reviewed the billing records and can attest that the records comport with general standards of timekeeping may rebut the government's allegations of vague or non-descriptive billing records.

The government may also contest a claimed EAJA fee based on duplication and similarly request the court to reduce the award in the exercise of discretion. At least one circuit court has held that reductions for alleged duplication, however, are appropriate "only if the attorneys are *unreasonably* doing the *same* work."[6] The burden is on government to show specific instances of unreasonable duplication.[7]

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[5] *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) ("plaintiff's counsel ... is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures").

[6] *Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original).

[7] *McGrath v. County of Nevada*, 67 F.3d 248, 255-256 (9th Cir. 1995).

The need for multiple attorneys to prepare briefs to ensure timely filing, share information, assign responsibilities, and plan strategy is well recognized.[8]

III. FILING DEADLINE

The EAJA statute requires fee applications to be filed within 30 days of "final judgment" in the action. 28 U.S.C. § 2412(d)(1)(B). A "final judgment" means a judgment that is final and not appealable, and includes an order of settlement. 28 U.S.C. § 2412(d)(2)(G). Thus, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal. In immigration cases (where longer appeal deadlines apply because the government is always a party), the time for filing an appeal varies depending on whether the case was litigated in district or circuit court.

In district court cases, a party has 60 days after the judgment or order is entered by the district court to file an appeal. Fed. R. App. P. 4(a)(1)(B). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 60-day time period for filing an appeal**.** If an appeal is taken, the district court's judgment is not final and therefore the 30-day period for filing an EAJA fee application does not begin to run until all the appellate proceedings are concluded. *Al-Harbi v. INS*, 284 F.3d 1080, 1084 (9th Cir. 2002) ("final judgment" is "the date on which a party's case has met its final demise, such that there is no longer any possibility that the district court's judgment is open to attack").

If the circuit court remands the case, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal following the district court's entry of judgment on remand.

In circuit court cases, a party has 90 days after the judgment or order is entered by the circuit court to file a petition for certiorari to the Supreme Court. Sup. Ct. R. 13(1). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 90-day time period for filing a petition for certiorari. *Al-Harbi v. INS*, 284 F.3d 1080 (9th Cir. 2002) and cases cited therein. The date the mandate is issued is not relevant to calculation of the filing deadline. *Zheng v. Ashcroft*, 383 F.3d 919, 921-22 (9th Cir. 2004).

If a petition for rehearing is filed in the court of appeals, the 90-day period to file a petition for certiorari runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. Sup. Ct. R. 13(3). Moreover, if the losing party files a petition for certiorari, the circuit court's judgment is not final and therefore the 30-day period for filing an EAJA fee application would not begin to run until the Supreme Court denies the petition for certiorari. In the event that the Supreme Court grants the petition for certiorari, the 30-day period would not begin to run until the Supreme Court enters judgment or, if the case is remanded, until the circuit (or possibly the district court if the circuit court orders remand) enters judgment.

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[8] *See, e.g., Berberena v. Coler*, 753 F.2d 629, 633-634 (7th Cir. 1985); *McKenzie v. Kennickell*, 645 F. Supp. 437, 450 (D.D.C. 1986); *Tchemkou v. Mukasey*, 517 F.3d 506, 511-12 (7th Cir. 2008).

In general, the government responds to EAJA fee applications by filing an opposition within the time prescribed by Federal Rule of Appellate Procedure 27(a)(3) or by requesting additional time to file a response. At least one court has held the lack of a timely opposition may warrant granting the fee application. In *Gwaduri v. INS*, 362 F.3d 1144 (9th Cir. 2004), the government filed an opposition along with a motion to accept the untimely opposition nearly six weeks after the due date. The court denied the motion to accept the untimely opposition and granted fees, stating "[t]here is simply nothing in the significantly delinquent motion for filing out of time that justifies the government's lengthy silence in this matter." 362 F.3d at 1146. The court reasoned that it was "well-within" its discretion to determine that the government's lack of a timely opposition amounted to a concession that its litigation position was not substantially justified or, alternatively, a failure to offer a basis for a finding of substantial justification. *Id*.

IV. WHERE TO FILE

The EAJA statute does not specify where to file an EAJA fee request. However, logic and common practice dictate that where only one court has considered the merits of the case, that same court should consider the merits of the EAJA fee request. In a petition for review, an EAJA fee application is properly filed in the court of appeals that adjudicated the petition. In district court actions where neither side appealed to the court of appeals, the application is properly filed in the district court where the action was adjudicated.

In district court actions where one side appeals on the merits, the issue of where to file is more complicated as the appellate court may issue the final judgment in the case when adjudicating the appeal or may remand the case for further proceedings. When an EAJA fee request includes fees for appellate work, it is advisable to review the appropriate circuit court case law and consult the court's local rules.

Some courts have indicated a preference for district courts to adjudicate fee requests that include appellate fees.[9] Other courts have awarded fees for appellate work without remanding for the

[9] *See, e.g., Foster v. Mydas Assocs., Inc.*, 943 F.2d 139, 144-45 (1st Cir. 1991) (noting that determination of fee award by appellate court in first instance would usurp trial court function); *McDonald v. Secretary of Health and Human Services*, 884 F.2d 1468, 1481 (1st Cir. 1989) ("Plaintiffs may also apply to the district court for attorneys' fees reasonably incurred in connection with the present appeal.") (footnote omitted); *Garcia v. Schweiker*, 829 F.2d 396, 398 (3d Cir. 1987) (reiterating the district court should set the fees for work in both courts when representation in each was required) (citation omitted); *Smith v. Detroit Bd. of Educ.*, 728 F.2d 359, 360 (6th Cir. 1984) (per curiam) (district court more appropriate forum to award fees incurred in appeal); *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 588-91 (9th Cir. 1984) (remanding to district court to reconsider award of attorney fees for appellate work); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1527 (10th Cir. 1984) (antitrust action remanded to district court to award appropriate attorney fees for appellate work), *aff'd*, 472 U.S. 585 (1985). *See also, Spell v. McDaniel*, 852 F.2d 762, 766 (4th Cir. 1988) (reviewing district court award of fees for appellate work under § 1988). *And see, Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970) (stating that the amount of attorneys' fee award for appellate services

district court to award fees in the first instance.[10] Still other courts have suggested that either the district court or the court of appeals may adjudicate fee requests that include fees for work on appeal.[11] In the Second Circuit, applications for appellate fees are filed directly with the court of appeals.[12]

Some courts have separate local rules for attorneys' fees requests in general and local rules for fee requests under EAJA. Many local rules expressly provide that the court of appeals may remand fee requests filed in the courts of appeals to the district court for adjudication upon a motion or in the exercise of the court's discretion.[13]

For a discussion regarding where to file an EAJA fee application for work done before the Supreme Court, *see Dague v. Burlington*, 976 F.2d 801, 803-805 (2d Cir. 1991).

V. STATUTORY REQUIREMENTS

The EAJA statute, 28 U.S.C. §§ 2412(d)(1)(A)&(B), directs that a fee application must include:

- A showing that the petitioning party is a prevailing party.

- An allegation that the pre-litigation and litigation position of government was not substantially justified. *See also,* 28 U.S.C. § 2412(d)(2)(D).

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under § 4 of the Clayton Act "should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered").

[10] *See, e.g., Jenkins by Jenkins v. Missouri*, 127 F.3d 709, 719 (8th Cir. 1997) and cases cited therein.

[11] *Martin v. Heckler*, 754 F.2d 1262, 1265 n. 6 (5th Cir. 1985) ("In some cases, applications for fees and expenses should be considered in the district court in the first instance. In others, we may consider them first.") (citations omitted); *Ekanem v. Health & Hosp. Corp.*, 778 F.2d 1254, 1257 (7th Cir. 1985) ("our research reveals that a petition on entitlement to appellate attorneys fees may be filed in either the district court or the court of appeals"). *See also,* 11th Circuit R. 39-2 (e) (permitting attorneys fees request to be filed in district court in lieu of court of appeals where appeal resulted in remand for further proceedings).

[12] *Smith v. Bowen*, 867 F.2d 731, 736 (2d Cir. 1989) ("applications [under the EAJA] for appellate fees in this Circuit should be filed directly with the Court of Appeals"); *McCarthy v. Bowen*, 824 F.2d 182, 183 (2d Cir. 1987) (per curiam) (directing the filing of EAJA appellate fee applications in court of appeals so that it may determine whether to enlist the aid of the district court in resolving disputed issues).

[13] *See, e.g.,* 1st Circuit R. 39(a) ("The court in its discretion may remit any such [EAJA fee] application to the district court for a determination."); 8th Circuit R. 47A ("On the Court's own motion or at the request of the prevailing party, a motion for attorneys fees may be remanded to the district court or administrative agency for appropriate hearing and determination."); 9th Circuit R. 39-1.8 ("Any party who is or may be eligible for attorneys fees on appeal to this Court may, . . ., file a motion to transfer consideration of attorneys fees on appeal to the district court . . from which the appeal was taken."); 11th Circuit R. 39-2 (d) (permitting motion to transfer fee application to district court from which the appeal was taken).

- An allegation that there are no special circumstances that would make an award unjust.

- A showing that the petitioning party has met the appropriate "net worth" requirements. *See also,* 28 U.S.C. § 2412(d)(2)(B).

- A statement of the total amount of fees and costs sought along with an itemized account of time expended and rates charged.

Each of these statutory requirements is discussed in detail below. However, one additional statutory requirement is worth mentioning here.

The EAJA statute applies to "any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action." 28 U.S.C. § 2412(d)(1)(A). Thus, in the immigration context, EAJA fees generally are available in petitions for review, mandamus actions, and habeas corpus actions. EAJA fees generally are not recoverable in actions under the Federal Tort Claims Act but some courts have allowed recovery where the government acted in "bad faith." *Rodriguez v. United States*, 542 F.3d 704 (9th Cir. 2008); *Campbell v. U.S.*, 835 F.2d 193 (9th Cir. 1987); *Sanchez v. Rowe*, 870 F.2d 291 (5th Cir. 1989).[14]

The government has argued that the term "civil action" does not unambiguously encompass habeas corpus actions under 28 U.S.C. § 2241 and, thus, EAJA fees are not available in habeas cases. While some courts have accepted this argument for prisoners in *criminal* custody, importantly, no court has accepted it for noncitizens in *immigration* custody. *Vacchio v. Gonzales*, 404 F.3d 663, 668-72 (2d Cir. 2005) (rejecting government's argument that habeas petition challenging an immigration detention does not qualify as a "civil action"); *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 901 (E.D.Wisc. 2007) (same); *O'Brien v. Moore*, 395 F.3d 499, 507-08 (4th Cir. 2005) (accepting government's "civil action" argument but expressly distinguishing habeas petitions challenging immigration detentions from habeas petitions in the criminal context); *In re Petition of Hill*, 775 F.2d 1037, 1040-41 (9th Cir. 1985) (rejecting government's "civil action" argument in habeas case challenging petitioner's exclusion).

A. Prevailing Party Status

To qualify for an EAJA award, the petitioning party has the burden of proving that he is a prevailing party. A "prevailing party" is one who "has been awarded some relief by a court." *Buckhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 603 (2001).

[14] In general, EAJA fees also are *not* recoverable against the government in successful damages actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Kreines v. U.S.*, 33 F.3d 1105 (9th Cir. 1994); *Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir.1984).

1. Prevailing Party Status Cannot Be Based On the "Catalyst Theory"

Under the so-called "catalyst theory," a litigant was entitled to prevailing party status if the lawsuit was a catalyst that prompted the government to voluntarily alter its conduct. For example, a party could be considered a "prevailing party" under the catalyst theory if the lawsuit prompted the government to voluntarily grant the requested relief or pass legislation that mooted the federal case.

In *Buckhannon*, the Supreme Court held that the "catalyst theory" is no longer a permissible basis for an attorneys' fees award under the fee-shifting statutes at issue in that case. The "catalyst theory" "allows an award where there is no judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 605. The Court held that a party can only be deemed a prevailing party, for purposes of fee-shifting statutes such as EAJA, if there has been an enforceable "alteration of the legal relationship of the parties." *Id.* at 621. Thus, under *Buckhannon*, a party whose suit prompts the precise relief sought may be a prevailing party if there is a judicially enforceable court entry memorializing the victory.

2. Types of Court Entries That May Prove Prevailing Party Status

Examples of court entries that may serve as the basis for an award of EAJA fees include enforceable judgments on the merits and settlement agreements that are favorable to one-side and enforceable through a consent decree. *Buckhannon*, 532 U.S. at 604-606. A consent decree is technically a judgment entered by consent of the parties whereby the government agrees to stop the alleged illegal activity without necessarily admitting guilt or wrongdoing.

Post-*Buckhannon* case law has created additional examples of judicially enforceable court entries specific to immigration cases. In *Vacchio v. Gonzales*, 404 F.3d 663, 673-74 (2d Cir. 2005), the court held that an interim order directing release pending adjudication of petitioner's habeas corpus appeal was sufficient to confer prevailing party status. In *Carbonell v. INS*, 429 F.3d 894, 901 (9th Cir. 2005), the court held that a district court order attesting to a voluntary stipulation between petitioner and INS to stay deportation pending the BIA's adjudication of a motion to reopen conveyed "prevailing party" status because it awarded a substantial portion of the relief sought.

In *Li v. Keisler*, 505 F.3d 913, 918 (9th Cir. 2007), the court held that an order issued by a circuit mediator granting an unopposed motion to remand after the petitioner filed an opening brief is sufficient to satisfy *Buckhannon* because the orders advanced the petitioners' goals and constituted material alterations of the parties' legal relationship.

In *Aronov v. Chertoff*, 536 F.3d 30, 39-40 (1st Cir. 2008) (en banc rehearing pending),[15] the court held that prevailing party status could be based on a district court order granting a joint motion to remand the petitioner's naturalization application to USCIS. The court reasoned the

[15] As of this writing, the First Circuit is considering the *Aronov* decision en banc, and may modify, withdraw, or adhere to the panel's decision. Readers should confirm the case's status before citing it.

order incorporated the terms of the joint motion, which provided that the petitioner could return to district court if the terms of the remand order were not met. Thus, the court concluded, the remand order in that case "was the functional equivalent of a consent decree." *Id.* at 40. *Accord, Lord v. Chertoff*, 526 F. Supp. 435, 438 (S.D.N.Y. 2007) (court approved consent agreement for USCIS to approve naturalization application satisfied *Buckhannon* standard because court retained jurisdiction to enforce the agreement if necessary); *Berishev v. Chertoff*, 486 F. Supp. 2d 202, 204-05 (D.Mass. 2007) (conciliatory remand order for adjudication of naturalization application satisfied *Buckhannon* Court's interpretation of "prevailing party").

District courts have held that an order granting mandamus to adjudicate an adjustment application is sufficient to convey prevailing party status. *See, e.g., Aboushaban v. Mueller*, 475 F. Supp. 943, 946 (N.D.Ca. 2007). *Accord Osman v. Mukasey*, 553 F. Supp. 1252 (W.D.Wash. 2008) (prevailing party status established and fees granted where district court ordered adjudication of petitioner's naturalization application pursuant to 8 U.S.C. § 1447(b)); *Liu v. Chertoff*, 538 F.Supp. 2d. 1116 (D.Minn. 2008) (same); *Alghawi v. Mukasey*, 543 F. Supp. 2d 1252 (W.D.Wash. 2008) (same).

Examples of court entries that may not serve as the basis for an award of attorney's fees include judicial pronouncements that the government has violated the INA or the Constitution without any grant of judicial relief. *Id.* at 606-607. In addition, changes in the actual circumstances of the parties that are not related to the federal court case may not be used as the basis for an EAJA fee award. *Id.* For example, if the BIA grants a motion to reopen or reconsider after the filing of federal lawsuit challenging the final removal order, the petitioner in the federal lawsuit cannot be considered a prevailing party for purposes of an EAJA fee award if the federal case has been mooted out by the BIA's order. In the absence of an enforceable court ordered judgment or remedy, a court is not likely to find prevailing party status as defined by the Court in *Buckhannon. See, e.g., Zhaoxi Ma v. Chertoff*, __ F.3d __, 2008 U.S. App. LEXIS 22836 (2d Cir. Nov. 4, 2008) (plaintiff was not a prevailing party where USCIS corrected erroneous denial of adjustment application and adjusted plaintiffs' status after case filed but before court acted); *Morillo-Cedron v. District Director for the U.S. Citizenship & Immigration Servs.*, 452 F.3d 1254, 1257-58 (11th Cir. 2006) (prevailing party status was not conferred where CIS voluntarily granted permanent resident status before the district court entered any final judgment); *Perez-Arellano v. Smith*, 279 F.3d 791, 795 (9th Cir. 2002) (finding plaintiff was not a prevailing party where he naturalized during litigation and district court dismissed the case as moot).

In light of *Buckhannon*, if the government grants the relief sought before the court decides the case on the merits, memorializing the victory in a court-approved order or settlement will preserve eligibility for an award of EAJA fees. In this situation, counsel also may face tactical and ethical questions, including whether to attempt to negotiate attorney's fees and costs in the order or settlement agreement or wait and file an EAJA fee request after the court approves the order or settlement agreement.

3. Court Ordered Remand

a. Remand Where the Court Enters Judgment

Whether a court-ordered remand to the Board confers prevailing party status can be tricky. The primary case on this issue is *Shalala v. Schaefer*, 509 U.S. 292 (1993). In *Shalala*, the Supreme Court held that a social security claimant who obtained a reversal and remand of a Secretary of Health and Human Services' administrative decision pursuant to sentence four of 42 U.S.C. § 405(g) was a prevailing party. 509 U.S. at 300-301. Significantly, in cases remanded under this section, the court enters judgment in the claimant's favor immediately and the litigation is terminated. In cases remanded under another social security provision, the court enters judgment after post-remand agency proceedings have been completed and their results are filed with the court. The Court's opinion in *Shalala* relied heavily on this distinction.

Therefore, *Shalala* supports finding prevailing party status when a court orders remand to the agency, enters a formal judgment immediately and does not retain jurisdiction over the federal court action. Arguably, the securing of the remand order is itself sufficient success on the merits to confer prevailing party status.

In *Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997), the Ninth Circuit granted the petition for review of the denial of petitioners' asylum applications and remanded their case to the BIA for further proceedings in light of its decision. The court's order terminated the proceedings and the court did not retain jurisdiction over future appeals. Petitioners then sought attorney's fees under EAJA. The Ninth Circuit reasoned that, since it could "perceive no difference between a 'sentence four' remand under 42 U.S.C. § 405(g) [at issue in *Shalala*] and a remand to the BIA for further proceedings," petitioners who obtain such remand are prevailing parties. *Rueda-Menicucci*, 132 F.3d at 495. In *Li v. Keisler*, 505 F.3d 913, 918 (9th Cir. 2007), the court extended this ruling to allow the recovery of fees in cases where the government moves for remand to the BIA after briefing has commenced, although not completed, and remand is granted by a circuit mediator.

The Seventh and Third Circuits have similarly ruled that a petitioner who wins remand for further proceedings is a prevailing party within the meaning of EAJA. The courts reasoned that petitioners' situations were analogous to the Supreme Court's decision in *Shalala v. Schaefer* and also noted that their conclusions were consistent with *Rueda-Menicucci v. INS*. *Muhur v. Ashcroft*, 382 F.3d 653, 654-55 (7th Cir. 2004); *Johnson v. Gonzales*, 416 F.3d 205, 209-10 (3d Cir. 2005). *See also, Salem v. United States INS*, 122 F. Supp. 2d 980, 984 (C.D.Il. 2000) (finding remand to the INS conferred prevailing party status under the rationale of *Rueda-Menicucci*).

As a practical matter, because the question of whether a party has prevailed on a significant issue in litigation potentially could be equated with whether the party requested the relief obtained, it is advisable to ask the court to vacate *and/or remand* the decision of the immigration service or court when drafting a request for relief.

b. Remand Where the Court Postpones Entering Judgment

If the court orders remand to the agency, postpones entering judgment until the completion of post-remand agency proceedings, and also retains jurisdiction over the federal court action, the petitioning party still may be eligible for prevailing party status if they are successful before the

agency on remand. [16] In this situation, there is some authority – primarily in the non-immigration context - suggesting that it *might* be possible to recover fees for administrative work on remand.

In *Ardestani v. INS*, 502 U.S. 129, 135 (1991), the Supreme Court held that EAJA fees cannot be awarded for the initial work done in administrative immigration proceedings. However, some courts have held that fees and costs for administrative work done pursuant to a remand order where the court retains jurisdiction (and postpones entering judgment until the remand proceedings are complete) are recoverable. *See Sullivan v. Hudson*, 490 U.S. 877, 889-890 (1989); *Melkonyan v. Sullivan*, 501 U.S. 89, 97 (1991); *Pollgreen v. Morris*, 911 F.2d 527, 536 (11th Cir. 1990) (INS forfeiture case); *Hafner v. Sullivan*, 972 F.2d 249, 252 (8th Cir. 1992).

B. Substantial Justification

An initial EAJA fee application must, at a minimum, *allege* that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(B).[17] However, as the government routinely attempts to demonstrate that its position was substantially justified, it is advisable to fully brief this important issue in the initial fee application rather than waiting to brief it in the reply brief when page space more limited.

Once the petitioning party establishes prevailing party status, the government can avoid payment of fees only if it can show that its pre-litigation conduct and litigation position were "substantially justified." In order to meet this heavy burden of proof, the government must show that its position has a reasonable basis both in law and in fact.[18] The government should meet this threshold twice -- it must independently establish that the agency misconduct that gave rise to the litigation was substantially justified, and that its litigation positions were also substantially justified. [19]

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[16] *Shalala*, 509 U.S. 299-300, discussing *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989). *See also, Former Emples. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1361 (Fed. Cir. 2003) ("We hold that parties who secure a consent order remanding a proceeding to an administrative agency because of an alleged error on the merits (where the court also retains jurisdiction) are 'prevailing parties' under EAJA if they succeed on the merits in the remand proceeding."); *Davidson v. Veneman*, 317 F.3d 503, 505-506 (5th Cir. 2003) (where district court ordered remanded to Farm Services Agency and stayed motion for EAJA fees pending completion of remand proceedings and plaintiff was successful in remand proceedings, plaintiff was entitled to prevailing party status).

[17] In *Scarborough v. Principi*, 541 U.S.401 (2004), the Supreme Court held that a timely filed EAJA fee application may be amended after the 30-day filing period has run to cure an initial failure to allege that the government's position in the litigation lacked substantial justification.

[18] *See, Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (defining substantially justified as "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person").

[19] 28 U.S.C. § 2412(d)(2)(D); *Commissioner, INS v. Jean*, 496 U.S. 154, 158-160 (1990); *Dantran, Inc. v. United States DOL*, 246 F.3d 36, 41 (1st Cir. 2001) ("To satisfy its burden, the government must justify not only its pre-litigation conduct but also its position throughout

Thus, if the court finds that the government's underlying, pre-litigation conduct lacks substantial justification, arguably the court need not consider whether its litigation positions were substantially justified.[20]

In some cases involving petitions for review of a BIA decision, the government has tried to argue that the relevant "position of the United States" was the position of the Department of Homeland Security (DHS), not the IJ or BIA decisions, because the Executive Office for Immigration Review and DHS are no longer in the same executive department following the 2002 enactment of the Homeland Security Act. In *Thangaraja v. Gonzales*, 428 F.3d 870, 873 (9th Cir. 2005), the Ninth Circuit rejected this argument, finding that it "completely lacks justification." 428 F.3d at 873. The court affirmed that the IJ's decision, summarily affirmed by the BIA, constituted "the action . . . by the agency upon which the civil action is based" under the plain language of the EAJA statute, and thus, the relevant pre-litigation position. 428 F.3d at 873. The court also found that nothing in the government reorganization resulting from the Homeland Security Act affected this conclusion because the EOIR and the DHS both "are part of the executive branch of the United States government, despite their mutual independence" and "the manner in which responsibilities are divided within the executive branch is immaterial to determining" the underlying government action upon which the petition for review was based. 428 F.3d at 873.[21]

A court evaluates whether the government's position is reasonable based on several factors, including the clarity of the governing law[22]; the foreseeable length and complexity of the

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litigation."); *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988) ("The inquiry into the existence of substantial justification therefore must focus on two questions: first, whether the government was substantially justified in taking its original action; and, second, whether the government was substantially justified in defending the validity of the action in court").

[20] *Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990) ("The single finding that the Government's position lacks substantial justification, like the determination that a claimant is a 'prevailing party,' thus operates as a one-time threshold for fee eligibility."); *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 138 (4th Cir. 1993) ("…*Jean* instructs that a single finding of governmental misconduct compelling a party to resort to litigation or to prolong litigation can open the door to recovery under the EAJA. . ."); *Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1993) (stating that "once a court determines that the government's position on the merits of the litigation is not substantially justified, it may not revisit that question as to any component of the dispute.") (citations omitted).

[21] *See also, Singh v. Gonzales*, 502 F.3d 1128 (9th Cir. 2007).

[22] However, the government's position is not *per se* justifiable simply because the case involves a new statute or an issue of first impression. *United States v. Real Prop. at 2659 Roundhill Drive*, 283 F.3d 1146, 1153 (9th Cir. 2002) *citing Gutierrez v. Barnhart*, 274 F.3d 1255, 1261 (9th Cir. 2001) ("There is no per se rule that EAJA fees cannot be awarded where the government's position contains an issue of first impression"). *But see, Cornella v. Schweiker*, 741 F.2d 170, 172 (8th Cir. 1984) (holding government reasonable in defending a district court judgment where "all of the purely legal issues were questions of first impression"); *Vacchio v. Gonzales*, 404 F.3d 663, 675 (2d Cir. 2005) (holding that an unsettled question of law combined

litigation, the consistency of the government's position, views expressed by other courts on the merits, legal merits of the government's position, and the stage at which the litigation was resolved. *See, generally, Jean v. Nelson*, 863 F.2d 759, 767-768 (11th Cir. 1988) *affirmed by Commissioner, INS v. Jean*, 496 U.S. 154 (1990).

In some circuits, there may be case law finding a *per se* lack of substantial justification where the government's position violates the Constitution, a statute, or its own regulations. *See, e.g., Mendenhall v. National Transp. Safety Bd.*, 92 F.3d 871, 874 (9th Cir. 1996) (citation omitted). *See also, Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004) (concluding that "the agency's position lacked substantial justification because it was 'wholly unsupported by the text' of the applicable regulations.") (citation omitted).

Once the court determines that the government's position lacks substantial justification, the prevailing party is presumptively eligible for fees for all phases of the federal case unless the prevailing party has "unreasonably protracted" a portion of the litigation, which would warrant exempting fees for that portion of the litigation from the award.[23]

C. Special Circumstances

The government has the burden of proving the existence of special circumstances that would make a fee award unjust.[24] This "special circumstances" exception to awarding attorneys fees was intended as a "safety valve" to allow the government to advance "novel but credible" legal theories and to give courts discretion to deny awards for equitable considerations. This provision of the EAJA is to be narrowly construed so as to not interfere or defeat Congress's purpose in passing the EAJA.[25]

Special circumstances include close or novel questions.[26] Equitable considerations can mean that the "prevailing party" acted in bad faith or has "unclean hands."[27]

D. Net Worth

If an individual plaintiff's net worth did not exceed $2,000,000 at the time the lawsuit was filed, he or she has met the net worth requirement for EAJA fee eligibility. 28 U.S.C. § 2412(d)(2)(B). A corporation must establish that it did not have more than 500 employees and its net worth did not exceed $7,000,000 at the time the lawsuit was filed. 28 U.S.C. § 2412(d)(2)(B). A non-

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with a government position that was "far from unreasonable" amounted to substantial justification).

[23] 28 U.S.C. § 2412(d)(2)(D); *Commissioner, INS v. Jean*, 496 U.S. 154, 161 (1990).

[24] 28 U.S.C. § 2412(d)(1)(A); *Abela v. Gustafson*, 888 F.2d 1258, 1266 (9th Cir. 1989).

[25] *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985).

[26] *National Truck Equip. Ass'n v. NHTSA*, 972 F.2d 669, 671 (6th Cir. 1992); *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 431 (5th Cir. 1982).

[27] *Taylor v. U.S.*, 815 F.2d 249, 252-254 (3rd Cir. 1987); *Midwest Research Institute v. United States*, 554 F. Supp. 1379, 1392 (W.D. Mo. 1983), *aff'd*, 744 F.2d 635 (8th Cir. 1984); *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir. 1983).

profit entity must only show that it did not have more than 500 employees at the time the lawsuit was filed.

Net worth is calculated for each individual named party to the lawsuit. Net worth should, at a minimum, be documented by submitting a signed affidavit attesting that the petitioning party met the appropriate requirements at the time the lawsuit was filed.[28]

VI. Calculating Fees, Rates and Adjustment for Inflation

EAJA fees are based upon "prevailing market rates for the kind and quality of the services furnished, except . . . attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A).

Thus, the statutory hourly rate of compensation for attorneys is $125 for cases commenced on or after March 29, 1996. This amount can be "adjusted" or "enhanced" for inflation based on cost of living adjustments (COLA) or the presence of a special factor.

1. EAJA Statutory Rate Adjusted for Inflation

Most courts calculate the "adjustment" or "enhancement" for inflation by using the Consumer Price Index for All Urban Consumers (CPI-U).[29] The CPI-U is published by the Bureau of Labor Statistics and is updated monthly. It can be located on-line at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt. The courts measure the COLA as of March 1996, when the statutory hourly rate of attorney compensation was raised from $75 per hour to $125 per hour. The March 1996 CPI-U is 155.7, and also can be located on-line at the link above.

One formula that is often used for calculating the cost of living adjustment is:

$$\$125 \times \frac{\text{(current CPI-U)}}{\text{(March 1996 CPI-U)}}.$$

See Ramon-Sepulveda v. INS, 863 F. 2d 1458, 1463, fn. 4 (9th Cir. 1988); *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004); *Edwards v. Barnhart*, 214 F. Supp. 2d 700, 702, n. 3 (W.D. Tex. 2002); *Walker v. Barnhart*, 302 F. Supp. 2d 1072, 1075 (S.D. Iowa 2002).

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[28] *United States v. Heavrin*, 330 F.3d 723, 732 (6th Cir. 2003); *Shooting Star Ranch, LLC v. United States*, 230 F.3d 1176, 1178 (10th Cir. 2000).

[29] *See, e.g.*, *Harris v. Sullivan*, 968 F.2d 263, 264-266 (2d Cir. 1992) and cases cited therein; *Dewalt v. Sullivan*, 963 F.2d 27, 27-30 (3d Cir. 1992); *Sullivan* v. *Sullivan*, 958 F.2d 574, 578 (4th Cir. 1992); *Begley v. Secretary of HHS*, 966 F.2d 196, 199-200 (6th Cir. 1992); *Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990); *Ramon-Sepulveda v. INS*, 863 F. 2d 1458, 1463 (9th Cir. 1988).

Some case law suggests that the regional CPI-U, and not the national, is appropriate to use in computing the EAJA rate adjusted for inflation. [30] The Ninth Circuit has clarified that the national CPI-U, and not the regional, should be used in fee applications filed in that circuit.[31] For individuals in areas with higher costs of living, the use of the regional CPI-U would mean a higher statutory rate of compensation.

Some courts have required that COLA calculation be done for the year of the fee award. In the equation set forth above, this would mean that the "current" CPI-U reflects the figure of the current year. [32] More recently, however, courts have applied a COLA adjustment for each year in which the work was performed. [33] In the equation set forth above, this means that the hourly rate for each year attorney work was performed would require a separate COLA rate calculation using a different CPI-U figure for each year.

2. Enhanced Rates Based on Special Factors

Attorney rates also may be increased if a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A)(ii). The Supreme Court has addressed the meaning of the phrase "the limited availability of qualified attorneys for the proceedings involved" as follows:

> We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of general lawyerly knowledge and ability useful in litigation. An example of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.

Pierce v. Underwood, 487 U.S. 552, 572 (1988).[34]

Some courts have recognized that a specialized knowledge of immigration law could warrant enhanced attorney rates.[35]

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[30] *See, Chen v. Slattery*, 842 F. Supp. 597, 600 n.2 (D.D.C. 1994); *Stanfield v. Apfel*, 985 F. Supp. 927, 931 (E.D. Mo. 1997); *Peterson v. Shalala*, 818 F. Supp. 241, 245 n. 3 (S.D. Ill. 1993).

[31] *See, Thangaraja v. Gonzales*, 428 F.3d 870, 877 (9th Cir. 2005); *see also,* Ninth Circuit Notice Regarding Statutory Maximum Rates Under Equal Access to Justice Act, available at: *www.ca9.uscourts.gov.*

[32] *See, e.g., Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990); *Garcia v. Schweiker*, 829 F.2d 396, 401-402 (3d Cir. 1987).

[33] *See, e.g., Sorenson v. Mink*, 239 F.3d 1140, 1143 (9th Cir. 2001); *Wilkett v. Interstate Commerce Com.*, 857 F.2d 793, 875 (D.C. Cir. 1998); *Perales v. Casillas*, 950 F.2d 1066, 1076 (5th Cir. 1992).

[34] In the Ninth Circuit, an enhanced rate may be warranted if the attorney possesses distinctive knowledge and skills developed through a practice specialty; the skills are needed in the litigation; and the skills are not available elsewhere at the statutory rate. *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) (citation omitted).

Special factors do *not* include the limited availability of qualified attorneys, litigation that involves novel and difficult issues, the undesirability of the case, expertise of counsel, or the results obtained. These factors are considered "applicable to a broad spectrum of litigation ...." *Pierce*, 487 U.S. at 573.

When reviewing enhanced rate requests, courts will want to see evidence of the attorney's particular qualifications and how those qualifications were needed in the litigation, and information regarding the lack of availability of attorneys who could litigate the case. *Floroiu v. Gonzales*, 498 F.3d 746 (7th Cir. 2007). Declarations from other attorneys will help document a claim for enhanced rates based on expertise in immigration law. The declarations could explain why immigration law expertise was necessary to litigating the case and further attest that petitioner/s would be unable to find an attorney with the requisite immigration expertise at the $125 EAJA statutory rate.

3. Prevailing Market Rates

Attorneys Seeking Enhanced Rates

An attorney who has demonstrated entitlement to an enhanced rate based on special factors should be compensated based on prevailing market rates, 28 U.S.C. § 2412(d)(2)(A)(ii), without regard to whether the attorney is *pro bono* or retained for a fee. *Blum v. Stenson*, 465 U.S. 886, 895-6 (1984). The prevailing market rate need not reflect the rate charged to the client.

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[35] *See, e.g., Muhur v. Ashcroft*, 382 F.3d 653, 656 (7th Cir. 2004) (noting "immigration lawyers are not *ipso facto* entitled to fees above the statutory ceiling" finding immigration expertise, "such as knowledge of foreign cultures or of particular, esoteric nooks and crannies of immigration law," warranted a special factor rate adjustment); *Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997) (stating "a specialty in immigration law could be a special factor warranting an enhancement of the statutory rate" if that specialty is "needful for the litigation in question"); *Pollgreen v. Morris*, 911 F. 2d 527, 537-38 (11th Cir. 1990) (recognizing that a "special factor" rate adjustment might be appropriate for attorneys who have a special expertise in immigration law); *Douglas v. Baker*, 809 F. Supp. 131, 135 (D.D.C. 1992) (awarding enhanced EAJA rate based, in part, on attorneys extensive experience in immigration law). *But see, Johnson v. Gonzales*, 416 F.3d 205, 213 (3d Cir. 2005) (enhancement not warranted in case involving "straightforward application of the substantial evidence and asylum standards…"); *Perales v. Casillas*, 950 F.2d 1066, 1078-79 (5th Cir. 1992) (immigration lawyers, unlike patent lawyers and experts in foreign law, are not *per se* specialized for special factor assessment purposes); *National Ass'n of Mfrs. v. United States DOL*, 962 F. Supp. 191 (D.D.C. 1997) ("Unlike patent law, no technical education is necessary to excel in either" immigration or administrative law). *See also, Thangaraja v. Gonzales*, 428 F.3d 870, 876 (9th Cir. 2005) (declining to adopt a *per se* rule that immigration law is a specialty area similar to practicing patent law); *Atlantic Fish Spotters Ass'n v. Daley*, 205 F.3d 488, 492-493 (1st Cir. 2000) (finding enhanced EAJA rate was improper because special experience in fisheries law was not required for competent representation in the case).

Market rate surveys are available to demonstrate prevailing rates of attorneys based on specialization, location, and years of experience. Declarations from other attorneys of similar expertise and years of experience attesting to their individual and/or firm's hourly rate can also be submitted to establish prevailing market rates. For example, an attorney in Los Angeles with 8-10 years of immigration experience who is claiming an enhanced rate of $300 per hour could document the prevailing market rate for their services by submitting one or more declarations from other immigration lawyers in Los Angeles with 8-10 years of similar immigration experience attesting that they routine charge an hourly rate of $300 (or more).

Law Clerks, Paralegals and Expert Witnesses

Law clerks, paralegals and expert witnesses also may be compensated under EAJA at the prevailing market rate.[36] The Supreme Court recently affirmed that paralegal work is recoverable at prevailing market rates. *Richlin Sec. Serv. Co. v. Chertoff*, 128 S. Ct. 2007, 2019 (2008). The prevailing market rate need not reflect the rate charged to the client. The statute provides that expert witnesses cannot be compensated at a "rate in excess of the highest rate of compensation for expert witnesses paid by the United States." 28 U.S.C. § 2412(d)(2)(A)(i).

Market rate surveys often contain information on prevailing rates for law students and paralegals. Declarations from other attorneys attesting to the rates paid to law students and paralegals in the area also can be submitted to establish prevailing rates.

[36] 28 U.S.C. § 2412(d)(2)(A); *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988); *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983); *Jordan v. U.S. DOJ*, 691 F.2d 514, 522-524 (D.C. Cir. 1982). *See also, Missouri v. Jenkins*, 491 U.S. 274, 281-289 (1989).